APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED NOVEMBER 2, 1999

Sandra Kay BATTISTA; Joan Renee Taylor; Douglas Fabbri; Laurie Lou Chandler; Sherry Leysen; Karen A. Marino; Patsy D. Thompson; Bobbie J. McNeil; Mary Marsicano; Shirley A. Van Buskirk; Erika Rivero; Robert B. Fatemick; Donald J. Bruyn; Annette Hanson; Julie C. Mazo; Constandeanna Elenie Wright; Glenda C. Moberg; Pamela A. Fairchild; Rebecca L. Smith; Cathy Lynn Fulton-Maloney; Harold Richard Norbrothen; Deborah Jane Tafoya; Carmen Razo; Robert Edward Steele; David S. Gordon; Linda Susan Aubin; Gilbert Fonseca; Mary Kellogg; Lisa M. Kelsey; Laura Lilly; Carole Meyers; James W. Pilgrim; Sarah E. Rodriguez; Nancy L. Shipman; Shawn Alison Shoemaker; Donna Smith; Jackie Todd; Courtney Wight; Cheryl C. Zweber; Carol Ann Okon; Lois A. Marcus; James L. Lauritzen; Valerie A. Hussey; Roberta L. Facchina; Ina Hahn; Diane Jo Allen; Tracy A. Allen; Carol Dignard; Hasmik Keyribaryan; Cathy Kiaha; George Klasser; Evodio Medina; Violette Naaman; Kimberly Jo Oliva; Hasmik Pashaie; Susan J. Rossi; Maria Del Carmen Contreras; John U. Crandall, III; Jan M. Eisenbeisz; Kyle Lance Miller,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Defendant-Appellee.

Appendix A

No. 97-56747.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 13, 1999.

Decided Nov. 2, 1999.

* * *

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. No. CV 95-00017 GLT.

Before: BOOCHEVER, O'SCANNLAIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

Sandra Kay Battista and other former employees (collectively "Battista" or "employees") of the Bank of Newport ("Bank") appeal an order of the district court that permitted the Federal Deposit Insurance Corporation ("FDIC") to pay a judgment to the employees in receiver's certificates rather than in cash. The employees also appeal the district court's refusal to award prejudgment interest. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

The Bank, a financial institution insured by the FDIC, had a severance policy that provided severance and

separation payments to employees terminated without just cause. In 1994, the California Superintendent of Banks declared the Bank insolvent and the FDIC was appointed its receiver. Pursuant to its authority under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), the FDIC repudiated the employees' contracts, including the agreements regarding severance and separation payments. The employees timely filed claims with the FDIC for their severance and separation payments, which the FDIC disallowed.

The employees brought suit against the FDIC seeking damages for their severance and separation pay, interest, and attorney's fees and costs. The parties entered into a Stipulated Pretrial Conference Order, in which they stipulated that a trial of the facts was unnecessary. In addition to agreeing on a number of facts, the parties stipulated to the FDIC's authority to repudiate the severance and separation pay agreements under FIRREA and to the resulting liability of the FDIC, as receiver, for damages under 12 U.S.C. § 1821(e)(3).[1] Two issues remained: (1) whether the employees were entitled to payment of the judgment in cash rather than in receiver's certificates; and (2) whether the FDIC was liable for prejudgment interest on the employees' damages.[2]

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1. All subsequent statutory references and citations are to Title 12, United States Code.

2. The collective judgment for the various employees, without interest, was $731,354.80.

The district court subsequently granted the FDIC's motion that it be allowed to satisfy the judgment by payment with receiver's certificates and that the employees were not entitled to prejudgment interest, and entered judgment against the FDIC.[3] The employees timely appealed.

II.

The interpretation of a statute is a question of law reviewed de novo. See Alexander v. Glickman, 139 F.3d 733, 735 (9th Cir.1998). Whether prejudgment interest is permitted is a question of law reviewed de novo. See Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir.1995).

III.

Congress enacted FIRREA in 1989 in response to the nation's banking crisis. See Sharpe v. FDIC, 126 F.3d 1147, 1154 (9th Cir.1997). The statute "allows the FDIC to act as receiver or conservator of a failed institution for the protection of depositors and creditors," id., establishing a scheme for dealing with claims against the failed institution.

Section 1821(d) of FIRREA outlines the powers and duties of the FDIC as conservator or receiver, authorizing the agency to, inter alia, determine and pay claims against the financial institution in accordance with the subsection's requirements. Subsections 1821(d)(3)-(6) set forth the procedures for the determination of claims, and § 1821(d)(11) establishes a distribution priority for claims to the financial institution's assets.

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3. The employees' motion for reconsideration was denied.

Appendix A

Subsection 1821(e) authorizes the FDIC, as receiver, to repudiate any contract of the insolvent financial institution it deems burdensome, so long as the repudiation of the contract will promote the orderly administration of the financial institution's affairs, see § 1821(e)(1), and the repudiation is made within a reasonable time of the receiver's appointment, see § 1821(e)(2). Repudiation gives rise to an ordinary contract claim for damages. See Howell v. FDIC, 986 F.2d 569, 571 (1st Cir.1993). FIRREA, however, limits damages for repudiation to those enumerated in § 1821(e)(3): "actual direct compensatory damages" determined as of "the date of the appointment of the conservator or receiver."[4] The

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4. Subsection 1821(e)(3) provides:

(A) In general

Except as otherwise provided in subparagraph (c) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of —

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(Cont'd)

question we must decide is whether a claim for damages under § 1821(e) based on a repudiated contract is subject to the payment scheme outlined in § 1821(d), or whether, as Battista claims, subsection (e) establishes a separate right to payment.

A.

There is no question that the FDIC may pay creditors with receiver's certificates instead of with cash. See RTC v. Titan Fin. Corp., 36 F.3d 891, 892 (9th Cir.1994) (per curiam). Section 1821(d)(10)(A) authorizes the FDIC, as receiver, to "pay creditor claims . . . in such manner and amounts as are authorized under this chapter." In Titan, we reasoned that the FDIC may use receiver's certificates as its manner of payment because requiring cash payments would subvert the comprehensive scheme of FIRREA, including § 1821(i)(2)'s limitation on an unsecured general creditor's claim to only a pro rata share of the proceeds from the

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(Cont'd)

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

§ 1821(e)(3)(A)-(B).

liquidation of the financial institution's assets. See Titan, 36 F.3d at 892 (citing Franklin Bank v. FDIC, 850 F.Supp. 845 (N.D.Cal.1994)). To require the FDIC to pay certain creditors in cash would allow those creditors to "jump the line," recovering more than their pro rata share of the liquidated assets, if the financial institution's debts exceed its assets. See id. (quoting Franklin Bank, 850 F.Supp. at 849).

Attempting to extricate her case from Titan 's seemingly dispositive holding, Battista argues that § 1821(d) does not govern situations in which the FDIC has repudiated a contract pursuant to § 1821(e). Specifically, she argues that Congress established two different types of claims: (1) approved claims under § 1821(d), which are payable with receiver's certificates from the assets of the financial institution; and (2) damages for repudiation under § 1821(e), which are payable only in cash. Analyses of § 1821's text, a related FDIC regulation, and case law, however, point to the conclusion that § 1821(e) is better interpreted as being subject to the various provisions of § 1821(d).

1. Section 1821's Plain Language

Contrary to Battista's argument, little in § 1821 indicates that Congress intended to establish two distinct types of non-depositor claims, beyond the fact that Congress provided for damages for repudiation in subsection (e), while discussing the claims payment process in subsection (d).

Battista points to the different time lines established in §§ 1821(d) and (e) for the making of claims. She notes that while § 1821(d) requires creditors to file claims within a

specified period of time after receiving notice of the financial institution's liquidation, see § 1821(d)(3)(B)(i), and requires the FDIC to approve or reject those claims within 180 days of their filing, see § 1821(d)(5)(A)(i), the FDIC need only repudiate a contract under § 1821(e) within a "reasonable period" following its appointment as receiver, § 1821(e)(2). From this difference, Battista concludes that § 1821(e) creates a "full-blown absolute right to seek damages for the repudiation."

Battista also argues that Congress must have created two types of claims because § 1821(d) speaks in terms of "approved claims" or "disallowed claims," while § 1821(e) refers only to "claims for damages." According to Battista, the principle of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion," Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (citation omitted) (internal quotation marks omitted), requires us to find that damages, which are not mentioned in § 1821(d), are not included within § 1821(d)'s framework.

The absence of specific deadlines or references to "approved" or "disallowed claims" in § 1821(e), however, also supports the contrary conclusion that § 1821(e) does not establish a separate regime from § 1821(d). There is no reason to repeat § 1821(d)'s requirements in § 1821(e), if § 1821(e) claims are to be dealt with under § 1821(d).[5]

5. The same response can be made to Battista's argument that Congress must not have intended damages under § 1821(e) to be (Cont'd)

Similarly, Congress had no reason to speak of "approved claims" or "disallowed claims" in § 1821(e), if subsection (e)'s function was only to limit the damages that a claimant could seek for repudiation — damages that would either be approved or disapproved under the scheme established in subsection (d). That is, damages in § 1821(e) are merely a subset of the claims discussed in § 1821(d). This interpretation of § 1821 is more plausible than Battista's for several reasons.

First, if Congress had wished to depart from the § 1821(d) regime for claims for damages under § 1821(e), presumably it would have said so. In fact, it did just that in § 1821(f) with respect to the payment of insured deposits:

> In case of the liquidation of . . . any insured depository institution, payment of the insured deposits . . . shall be made by the Corporation as soon as possible . . . either by cash or by making available to each depositor a transferred deposit in a new insured depository institution . . . in an amount equal to the insured deposit of such depositor, except that —
>
> (A) all payments made pursuant to this section on account of a closed Bank Insurance Fund

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(Cont'd)
paid from the financial institution's assets because § 1821(e) does not state that damages are to be so paid. Subsection (e)'s silence is equally interpretable as evidence that Congress intended such claims to be resolved pursuant to subsection (d).

> member shall be made only from the Bank Insurance Fund. . . .

§ 1821(f)(1).

Second, it is unlikely that Congress would have provided such extensive guidelines for claims under § 1821(d) but neglected to even mention the presentation and payment of claims under § 1821(e), if it had intended for the two subsections to be mutually exclusive.

Third, Congress has limited the FDIC's liability, as a receiver, to the assets of the insolvent financial institution, unless the FDIC chooses to make additional payments from the Bank Insurance Fund:

> The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver of the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution. . . .

§ 1821(i)(2). Subsection 1821(i) gives no indication that its provisions are limited to claims under § 1821(d).

Fourth, the distribution priority in § 1821(d)(11)(A), which was added to § 1821 in 1993, makes little sense if parties injured by repudiations under § 1821(e) are treated separately from parties with claims under § 1821(d). Section 1821(d)(11)(A) provides, in relevant part:

Appendix A

> Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:
>
> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not a liability in clause (iv) or clause (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

§ 1821(d)(11)(A). This provision does not mention claims based on damages for repudiation. If claims under § 1821(e) were to be treated differently from claims under § 1821(d), however, one would have expected Congress to have given § 1821(e) claims a place in § 1821(d)(11)'s hierarchy. After all, § 1821(d)(11) includes depositors, for whom § 1821(f)

establishes a separate track for the making and paying of claims.[6]

In sum, the text of § 1821 strongly suggests that § 1821(e) claims are subject to the distribution priority scheme of § 1821(d).

2. FDIC Regulations

FDIC regulations regarding the definition of administrative expenses in § 1821(d)(11) also support this conclusion. Agency interpretations of this sort deserve significant deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme

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6. We note also that § 1821(e) expressly requires the application of § 1821(d) and (i) to the repudiation of a service contract. Although the term "service contract" is not defined in the statute, it may well include a contract for severance pay because severance pay is part of the compensation package that constitutes an employee's wages. Cf. Monrad v. FDIC, 62 F.3d 1169, 1173-74 (9th Cir.1995) (finding severance payments to constitute consideration for employee's entering into an at will employment relationship); Office & Prof'l Employees Int'l Union v. FDIC, 27 F.3d 598, 603-04 (D.C.Cir.1994) (same). Thus, this factor also appears to support construing § 1821(e) claims as being subject to the distribution scheme of § 1821(d). Because we conclude that § 1821(e) contract repudiation claims are subject to the distribution scheme of § 1821(d), we need not decide today whether a severance pay claim is a claim "for services performed before the appointment of . . . the receiver" under § 1821(e)(7).

it is entrusted to administer") (footnote omitted); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (agency's interpretation of its own regulations must also be given "substantial deference" and is to be disregarded only if "it is plainly erroneous or inconsistent with the regulation") (citation omitted) (internal quotation marks omitted).

Under § 1821(d)(11)'s distribution priority, the receiver's administrative expenses are paid ahead of all other claims. See § 1821(d)(11)(A)(i). In 1993, the FDIC promulgated an interim rule, which was fully adopted in 1995 as 12 C.F.R. § 360.4 (1999), that defines "administrative expenses" as including "those necessary expenses incurred by the receiver in liquidating . . . a failed insured depository institution. Such expenses shall include pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the institution." Significantly, the FDIC noted in its discussion of the interim rule that administrative expenses "[g]enerally . . . do not include expenses such as severance pay claims, golden parachute claims and claims arising from contract repudiations." 58 Fed.Reg. 43,069, 43,070 (1993). Thus, the FDIC interpreted § 1821(d)(11)'s priority scheme as including claims for damages arising from contract repudiation under § 1821(e), but not entitled to the same priority as administrative claims.

3. Case Law

Battista contends that there is no case law establishing that damages claims under § 1821(e) are equivalent to other

creditor's claims under § 1821(d). The FDIC argues, in contrast, that it is well-established that claims against the FDIC for actions taken in its capacity as receiver must comply with the administrative process established in § 1821(d)(3)-(6), thereby suggesting that the two types of claims are not distinct.

Battista relies on our decision in Sharpe, in which we considered whether parties aggrieved by the FDIC's breach of a contract held a § 1821(d) "claim" that would be subject to FIRREA's administrative exhaustion requirement. We concluded that they were not subject to the § 1821(d) claims process; however, we expressly noted the difference between the FDIC's breaching a contract and repudiating a contract. See Sharpe, 126 F.3d at 1157 ("Had the FDIC followed the § 1821(e) procedure in disaffirming the settlement agreement with the Sharpes, this would have been a very different case.").[7] Thus, contrary to Battista's contention, Sharpe did not hold that claimants whose contracts had been repudiated were not subject to the claims process of § 1821(d).

Monrad v. FDIC, 62 F.3d 1169 (9th Cir.1995), and Heno v. FDIC, 20 F.3d 1204 (1st Cir.1994), upon which Battista also relies, offer no help. Monrad held only that the FDIC is liable for severance payment damages when it repudiates an employment contract, a question that is not at issue here. See Monrad, 62 F.3d at 1172. And Heno does not address

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7. We left open in Sharpe the question of whether § 1821(e) is subject to § 1821(d)'s exhaustion requirement. See 126 F.3d at 1157 n. 7. Whether claims under subsection (e) must satisfy the jurisdictional bar is immaterial here because Battista exhausted the administrative claims process.

whether a § 1821(e) claim for damages is subject to the § 1821(d) process; in fact, it seems to assume in dicta that it is. See Heno, 20 F.3d at 1209 (including contract repudiation claims in its discussion of the FDIC's ability to evaluate claims submitted after the statutory bar date in § 1821(d)(5)).

Battista further argues that the district court erred by concluding that FIRREA preempts California law that requires all wages to be paid in cash.[8] This argument, however, ultimately rests on the assumption that claims for damages under § 1821(e) are not subject to the distribution priority of § 1821(d)(11)(A). Because we conclude to the contrary, this argument fails.

Section 1821(d)(11)(B)(i) notes that the distribution priority established in subparagraph (A) "shall not supersede

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8. Battista relies on two provisions of the California Labor Code: (1) The first defines "wages" as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertainable by the standard of time, task, piece, commission basis, or other method of calculation." Cal. Lab.Code § 200(a) (West 1999).(2) The second provides that payments of wages must be "negotiable and payable in cash, on demand, without discount." Cal. Lab.Code § 212(a). California law treats severance pay as wages. See Triad Data Servs. v. Jackson, 153 Cal.App.3d Supp. 1, 200 Cal.Rptr. 418, 423 (App. Dep't Supr. Ct.1984) ("[P]ursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as part of his compensation.") (internal quotation marks omitted) (citation omitted). It is not entirely clear, however, that California courts would apply § 212(a) to severance pay.

the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency." Requiring the FDIC to pay Battista's judgment in cash surely would be inconsistent with the distribution priority in § 1821(d)(11)(A). It would, as the FDIC correctly contends, "in effect elevate those whose severance contracts the FDIC as receiver has repudiated to the super priority status that Congress accorded only to administrative expenses." Claimants under § 1821(e) would be guaranteed payment in full, while other claimants would be limited to their share of whatever bank assets were left over.

In light of the text of § 1821, FDIC regulations, relevant case law, and the preemption of possibly contradictory state law, we conclude that the district court did not err in refusing to require the FDIC to pay Battista's judgment in cash.

B.

The employees also argue that they are entitled to prejudgment interest on the amount of their judgment. In Far West Fed. Bank, S.B. v. Office of Thrift Supervision-Dir., 119 F.3d 1358 (9th Cir.1997), however, we held that sovereign immunity bars an award of interest against the FDIC. Congress has not expressly waived the FDIC's immunity against prejudgment interest, nor does the FDIC fall under the exception of the government's waiver immunity when it operates as a commercial enterprise. See id. at 1366-67. We therefore conclude that the district court did not err in refusing to grant the employees prejudgment interest.

The employees argue that Far West is both distinguishable and wrongly decided. They argue, first, that Far West is distinguishable from this case because Far West did not involve liability arising from the FDIC's actions as a receiver under § 1821(e), which, according to them, take on more of the character of a private enterprise. Far West, however, did not limit the FDIC's immunity to certain actions; instead, it characterized the agency as a "governmental, regulatory entity . . . not a profit-making enterprise," and, therefore, "not a commercial entity." Id.; see also Sharpe, 126 F.3d at 1154 n. 3 (barring prejudgment interest against the FDIC based on sovereign immunity). We fail to see any reason to treat the FDIC's repudiation of a contract under § 1821(e) differently from its abrogation of certain forbearance agreements pursuant to other sections of FIRREA in Far West.

The employees also argue that Far West was wrongly decided. That contention, however, fails because a three-judge panel does not have the authority to overturn the decision of a prior panel. See Branch v. Tunnell, 14 F.3d 449, 456 (9th Cir.1994).[9]

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9. The intervening case of O'Melveny & Myers v. FDIC, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), does not undermine Far West 's holding. Cf. Branch, 14 F.3d at 456 (noting an exception to the rule that a panel may not reconsider the decision of another panel when there has been an intervening Supreme Court decision that "undermines the existing precedent . . . and both cases are closely on point") (internal quotation marks omitted) (citation omitted). In O'Melveny, the Supreme Court noted merely that FIRREA "places the FDIC in the shoes of the insolvent S & L, to

(Cont'd)

IV.

Because § 1821(e) is better interpreted as subjecting claims for damages for contract repudiation to the claims process of § 1821(d), and to the distribution priority in § 1821(d)(11) in particular, our decision in Titan permitting the FDIC to pay claims with receiver's certificates applies to repudiated severance pay claims. Therefore, the district court did not err in refusing to require the FDIC to pay the employees' judgment in cash. Furthermore, under Far West, the district court did not err in refusing to award the employees prejudgment interest. Accordingly, the judgment of the district court is

AFFIRMED.

(Cont'd)
work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." O'Melveny, 512 U.S. at 87, 114 S.Ct. 2048. It did not suggest that the FDIC was like a private enterprise for purposes of sovereign immunity.

APPENDIX B — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN RE PLAINTIFF'S MOTION FOR RECONSIDERATION DATED NOVEMBER 3, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. SA CV 95-17 GLT(EEx)
SA CV 95-53 GLT(EEx)
Date 11/3/97

Title: SANDRA KAY BATTISTA, et al. v. FEDERAL DEPOSIT INSURANCE CORPORATION

* * *

PRESENT:

HON. Gary L. Taylor JUDGE

Kathleen Peterson	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: MINUTE ORDER in re: PLAINTIFF'S MOTION FOR RECONSIDERATION

Appendix B

Having read and considered the submitted papers, the Court will construe them as a Motion for Reconsideration governed by Local Rule 7.16.[1] Plaintiff's Motion is DENIED.

A motion for reconsideration is proper when there is an issue of fact or law materially different from that previously presented, a new material fact or a change of law has arisen since the decision, or there is a manifest showing of a failure to consider material facts. Here, plaintiffs have simply repeated the arguments previously made in their written opposition and oral argument.

Much of plaintiffs re-argument is based upon *Sharpe v. FDIC*, __ F.3d __, 97 Daily Journal D.A.R. 12075 (9th Cir. Sept. 19, 1997).[2] Plaintiffs construe this Court's order as finding the FDIC is "always entitled to pay repudiated contract damages in receivers' certificates." Motion at 4. This is an overstatement. Certainly, when the FDIC acts outside its FIRREA authority a court can hold the FDIC directly liable. *See Sharpe*, 97 D.A.R. at 12079; *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269 (10th Cir. 1994). Since here the FDIC acted within its authority, the reasoning cited by

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1. Plaintiffs have entitled the pending motion a motion for reconsideration made pursuant to Fed.R.Civ.P. 59(e). Rule 59(e), however, governs "Motion[s] to Alter or Amend a Judgment." This court's October 1, 1997 order is not a judgment, nor has final judgement been entered in this case.

2. This case was discussed by the parties during oral argument and considered by the Court prior to issuing its order. In fact, by letter dated September 24, 1997, plaintiffs advised this Court they "intend[ed] to refer to . . . *Sharpe* . . . in oral argument.

plaintiffs is inapplicable. *Sharpe*, 97 D.A.R. at 12079 (stating "[h]ad the FDIC followed the § 1821(e) procedure in disaffirming the settlement agreement with the Sharpes, this would have been a different case.").

The Ninth Circuit has held receivers certificates may be used as payment when the FDIC has acted within their FIRREA authority. *See RTC v. Titan Financial Corporation*, 36 F.3d 891, 892 (9th Cir. 1994). Here, payment through receivers certificates is proper. The motion for reconsideration is DENIED. The hearing scheduled for November 10, 1997 is taken off calendar.

Initials of Deputy Clerk s/ RGP

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING DEFENDANT'S MOTION FOR ORDER THAT JUDGMENT BE SATISFIED IN RECEIVER CERTIFICATES AND PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST DATED AND FILED SEPTEMBER 29, 1997 AND ENTERED OCTOBER 1, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 95-17-GLT (EEx)
SA CV 95-53-GLT (EEx)

SANDRA KAY BATTISTA, et al.

Plaintiffs

vs.

FDIC,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ORDER THAT JUDGMENT BE SATISFIED IN RECEIVER CERTIFICATES AND PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST

Calendar Item #14

Defendant's Motion for Order that Judgment be Satisfied by Payment of Receiver Certificates is GRANTED. Defendant's Motion for Order that Plaintiffs are Not Entitled to Prejudgment Interest is GRANTED.

Appendix C

I. *Priority of Debtors*

Plaintiffs contend the FDIC should pay them in cash for losses caused by repudiation of pre-receivership contracts. First, plaintiffs assert § 1821(e) governs this dispute and authorizes direct compensatory payment. In the alternative plaintiffs contend the wage and employment priorities set forth under California law govern this case.

A. *Section 1821(e) Does Not Mandate Cash Payment, Rather Cash Payment is At the Discretion of the FDIC*

The FDIC is empowered to repudiate any contract that it deems advisable, but upon such repudiation it is liable for damages. Accordingly, plaintiffs sued under § 1821(e), established liability under § 1821(e), and the FDIC has stipulated it is liable under § 1821(e). Subsection 1821(e) provides parties to repudiated contracts or leases have a claim for damages.

However, § 1821(e) does not specify how these damages are to be paid. By asking for the damages in cash, not receiver certificates, plaintiffs are, in effect, asking to be paid ahead of other debtors.

Through the National Depositor Preference law, Congress has already limited the types of payments that a receiver may make ahead of general deposit liabilities. P.L. 103-66, 107 Stat. 312 (1993), codified as 12 U.S.C. § 1821(d)(11). Although the Debtor Preference law does not directly address damages under § 1821(e), the law does

expressly delegate discretion to the FDIC to identify and pay critical expenses.

Under this discretion, Congress charges the FDIC with authority to identify which debts of a failed bank may properly be regarded as so critical to the orderly administration of the receivership estate as to be immediately payable in cash as administrative expenses. This discretion is not unusual since it is generally within the power of an administrative agency to formulate policy and make rules to fill any gap left by Congress. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Accordingly, in August 1993, the FDIC Board of Directors determined that cash payments of severance and separation payments are not necessary for the orderly administration of a failed bank. The Board announced that determination as Rule No. 3064-AB25, published in the Federal Register, and codified as 12 C.F.R. 360.4. Therefore, the presumption is that severance and separation payments, even when they take the form of damages flowing from repudiated contracts, do not take automatic priority.

In this case, the FDIC has chosen not to depart from the presumption that repudiated contract damages do not merit cash, i.e., priority, payment. Accordingly, as general unsecured creditors, plaintiffs should receive payment in receiver certificates. Defendant's motion for such an order is GRANTED.

Appendix C

B. *Preemption*

Plaintiffs alternatively contend California law, which gives priority to severance and separation benefits, governs this case. Generally, "[s]tatutorially authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *New York v. FCC*, 486 U.S. 57, 64 (1988). Specifically, preemption occurs when Congress expressly so provides in a federal state; when there is a conflict between federal and state law; when compliance with both federal and state law is impossible; when there is an implicit barrier in the federal statute to state regulation; when Congress has comprehensively occupied the entire field and leaves no room for state law; or when state law is an obstacle to the objectives and purposes of Congress. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986) .

Here, Congress has expressed an intent to preempt "inconsistent" state law. FIRREA provisions "shall not superseded the law of any State except to the extent such law is inconsistent with the provisions [of the FIRREA]." § 1821(d)(11). Therefore, to the extent that any law of California is inconsistent with FIRREA, it is preempted.

Allowing California priorities to determine whether the FDIC pays the plaintiffs in cash or receiver certificates would directly conflict with federal law. Congress, through the National Depositor Preference law, has spoken about who should receive priority over general creditors, and has chosen not to give priority to wage and employment claims. In the absence of express priority, Congress has given the FDIC

discretion to identify which debts of a failed bank may properly be regarded as "critical," and thus immediately payable. Accordingly, FDIC discretion preempts state law priorities.

II. *Prejudgment Interest*

After the filing of this motion, the Ninth Circuit held that the FDIC is not subject to a pre-judgment interest award. *Far West Federal Bank, S.B. v. Office of Thrift Supervision Director*, __ F.3d __ (July 10, 1997) (97 Daily Journal D.A.R. 8851, 8855). Therefore, the motion for an order that plaintiffs are not entitled to prejudgment interest is GRANTED.

Disposition

For all the foregoing reasons, Defendant's Motion for Order that Judgment be Satisfied by Payment of Receiver Certificates is GRANTED. Defendant's Motion for Order that Plaintiffs are Not Entitled to Prejudgment Interest is GRANTED.

DATED: 9/29/97

s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX D — STIPULATED PRETRIAL CONFERENCE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION DATED AND FILED SEPTEMBER 17, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. SA CV 95-17 GLT (EEx)

Consolidated With:
No. SA CV 95-53 GLT (EEx)

SANDRA KAY BATTISTA, etc., et al.,

Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed Receiver of Bank of Newport, a failed depository institution,

Defendants.

CAROLE OKON, etc., et al.,

Plaintiffs,

vs.

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FEDERAL DEPOSIT INSURANCE CORPORATION, appointed Receiver of Bank of Newport, a failed depository institution,

Defendants.

STIPULATED
PRETRIAL CONFERENCE ORDER

Pretrial Conference:
August 11, 1997

Following pretrial proceedings pursuant to Rule 16, F.R.Civ.P., and C.D.Cal. Local Rule 9, and pursuant to stipulation between the parties hereto in lieu of the memoranda of contentions of fact and law required by C.D.Cal. Local Rule 9.5, IT IS ORDERED:

1. The parties are:

Plaintiffs in No. SA CV 95-17 GLT are SANDRA KAY BATTISTA, JOANNE RENEE TAYLOR, DOUGLAS FABBRI, LAURIE LOU CHANDLER, SHERRY LEYSEN, KAREN A. MARINO, PATSY D. THOMPSON, BOBBIE J. MCNEILL, MARY MARSICANO, SHIRLEY A. VAN BUSKIRK, ERIKA RIVERO, ROBERT B. FATERNICK, DONALD J. BRUYN, ANNETTE HANSON, JULIE C. MAZO, CONSTANDEANNA ELENIE WRIGHT, GLENDA C. MOBERG, PAMELA A. FAIRCHILD, REBECCA L. SMITH, CATHY LYNN FULTON-MALONEY, HAROLD RICHARD NORBROTHEN, DEBORAH JANE TAFOYA, CARMEN RAZO, ROBERT

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EDWARD STEELE, DAVID S. GORDON, LINDA SUSAN AUBIN, GILBERT J. FONSECA, MARY KELLOGG, LISA M. KELSEY, LAURA LILLY, CAROLE MEYERS, JAMES W. PILGRIM, SARAH E. RODRIGUEZ, NANCY L. SHIPMAN, SHAWN ALISON SHOEMAKER, DONNA SMITH, JACKIE TODD, COURTNEY WIGHT, CHERYL C. ZWEBER, RONALD B. HAYWARD, MARY K. BAN and JOANNE M. FISH.

Plaintiffs in No. SA CV 95-53 are CAROL ANN OKON, LOIS A. MARCUS, JAMES L. LAURITZEN, VALERIE A. HUSSEY, ROBERTA L. FACCHINA, INA HAHN, DIANE JO ALLEN, TRACY A. ALLEN, CAROL DIGNARD, HASMIK KEYRIBARYAN, CATHY KIAHA, GEORGE KLASSER, EVODIO MEDINA, VIOLETTE NAAMAN, KIMBERLY JO OLIVA, HASMIK PASHAIE, SUSAN J. ROSSI, MARIA DEL CARMEN CONTRERAS, JOHN U. CRANDELL III, JAN M. EISENBEISZ, KYLE LANCE MILLER, DOREEN MURDOCK and JULIE K. LUNGO.

Defendant in both actions is FEDERAL DEPOSIT INSURANCE CORPORATION, appointed Receiver of Bank of Newport, a failed depository institution.

The defendant was served and has appeared, and there are no unserved defendants.

The pleadings that raise the issues are the Third Amended Complaint in No. SA CV 95-17 GLT and the Second Amended Complaint in No. SA CV 95-53 GLT, and defendant's answers to those complaints.

2. Federal jurisdiction and venue are invoked on the basis of 12 U.S.C. § 1821(d)(6)(A) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and 28 U.S.C. § 1391(e).

3, 4. No trial of facts will be necessary but there are disputes as to two legal issues, whether defendant is liable to pay pre-judgment interest on plaintiffs' damages, and whether the judgment creditors are entitled to payment of the judgment for damages in cash rather than by Receiver's Certificates. Those issues will be presented by motion as provided in this stipulation.

5. The following facts are admitted, require no proof and are binding on the parties:

(a) BANK OF NEWPORT ("BANK") was a banking institution chartered by the State of California with its principal place of business in Newport Beach, California, and at all times its deposits were insured by the FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC").

(b) Each of the plaintiffs was an employee of BANK on August 12, 1994.

(c) At all relevant times, BANK had a policy that provided that each employee who was terminated other than for cause was entitled to receive severance and separation payments in consideration of his or her employment with BANK.

(d) On August 12, 1994, BANK was closed by the Superintendent of Banks of the State of California, and FDIC

was appointed as receiver with the rights, powers, duties and obligations conferred by law.

(e) On August 12, 1994, when FDIC assumed control of BANK and its assets, plaintiffs had an enforceable contractual right to severance and separation payments.

(f) After BANK was closed, each plaintiff duly executed and timely filed with FDIC its executed claim form demanding payment of his or her severance and separation payments pursuant to the official policy described herein, except plaintiffs EVODIO MEDINA, JOANNE M. FISH and MARY K. BAN.

(g) Defendant FDIC repudiated the contract of each plaintiff pursuant to 12 U.S.C. § 1821(e), by letter timely mailed to and received by each plaintiff, on the stated ground that the severance and separation payments provided by contract between BANK and each plaintiff were not unconditionally fixed and accrued on or before BANK was placed into receivership. The letters specified no other basis for repudiation.

(h) FDIC, as receiver, had the authority to repudiate the contracts described herein, but is liable under *Monrad v. FDIC*, 62 F.3d 1161, 1172 (9th Cir. 1995) and 12 U.S.C. § 1821(e)(3) for damages resulting from the repudiated severance and separation contracts to each plaintiff who filed a timely claim.

(i) Plaintiffs are each individually entitled to judgment for damages from defendant FDIC in the following principal amounts:

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SANDRA K. BATTISTA in the sum of $24,877.44;

JOAN RENEE TAYLOR in the sum of $8,884.54;

DOUGLAS FABBRI in the sum of $18,092.34;

LAURIE LOU CHANDLER in the sum of $5,538.40;

SHERRY LEYSEN in the sum of $2,250.00;

KAREN A. MARINO in the sum of $5,384.64;

PATSY D. THOMPSON in the sum of $16,635.00;

BOBBIE J. MCNEILL in the sum of $2,750.00;

MARY MARSICANO in the sum of $4,000.00;

SHIRLEY A. VAN BUSKIRK in the sum of $18,489.88;

ERIKA RIVERO in the sum of $6,000.48;

ROBERT B. FATERNICK in the sum of $10,149.86;

DONALD J. BRUYN in the sum of $24,648.84;

ANNETTE HANSON in the sum of $9,423.12;

JULIE C. MAZO in the sum of $8,075.20;

CONSTANDEANNA ELENIE WRIGHT in the sum of $24,432.90;

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GLENDA C. MOBERG in the sum of $31,585.68;

PAMELA A. FAIRCHILD in the sum of $18,050.70;

REBECCA L. SMITH in the sum of $8,151.80;

CATHY LYNN FULTON-MALONEY in the sum of $3,138.40;

HAROLD RICHARD NORBROTHEN in the sum of $3,066.96;

DEBORAH JANE TAFOYA in the sum of $12,055.20;

CARMEN RAZO in the sum of $8,641.03;

ROBERT EDWARD STEELE in the sum of $11,888.80;

DAVID S. GORDON in the sum of $6,634.60;

LINDA SUSAN AUBIN in the sum of $1,615.39;

GILBERT J. FONSECA in the sum of $3,440.00;

MARY KELLOGG in the sum of $15,667.20;

LISA M. KELSEY in the sum of $18,803.12;

LAURA LILLY in the sum of $5,400.00;

CAROLE MEYERS in the sum of $3,379.12;

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JAMES W. PILGRIM in the sum of $19,998.40;

SARAH E. RODRIGUEZ in the sum of $13,093.74;

NANCY L. SHIPMAN in the sum of $4,800.00;

SHAWN ALISON SHOEMAKER in the sum of $2,076.90;

DONNA SMITH in the sum of $4,000.00;

JACKIE TODD in the sum of $5,678.96;

COURTNEY WIGHT in the sum of $2,700.00;

CHERYL C. ZWEBER in the sum of $6,923.04;

RONALD B. HAYWARD in the sum of $8,307.68;

CAROL ANN OKON in the sum of $14,573.10;

LOIS A. MARCUS in the sum of $9,382.08;

JAMES L. LAURITZEN in the sum of $51,154.00;

VALERIE A. HUSSEY in the sum of $4,695.30;

ROBERTA L. FACCHINA in the sum of $36,346.32;

INA HAHN in the sum of $30,746.32;

DIANE JO ALLEN in the sum of $13,013.00;

TRACY A. ALLEN in the sum of $27,686.40;

CAROL DIGNARD in the sum of $17,791.76;

HASMIK KEYRIBARYAN in the sum of $6,000.00;

CATHY KIAHA in the sum of $10,449.60;

GEORGE KLASSER in the sum of $16,153.85;

VIOLETTE NAAMAN in the sum of $7,291.76;

KIMBERLY JO OLIVA in the sum of $4,995.24;

HASMIK PASHAIE in the sum of $4,650.00;

SUSAN J. ROSSI in the sum of $35,384.58;

JOHN U. CRANDELL III in the sum of $1,900.00 or $1,753.84;

MARIA DEL CARMEN CONTRERAS in the sum of $3,737.92;

JAN M. EISENBEISZ in the sum of $11,115.04;

KYLE LANCE MILLER in the sum of $11,666.72;

DOREEN MURDOCK in the sum of $6,257.52;

JULIE K. LUNGO in the sum of $7,714.74 or $7,500.00.

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Disputed amounts will be resolved by the parties before judgment is entered.

6. FDIC will concurrently file the declaration of Joyce Yamasaki and its attached exhibits, and an authenticated copy of Exhibit 1 and 2 to the Yamasaki declaration. Plaintiffs have the right to make any objection to the use or interpretation of the declaration and/or the exhibits including, but not limited to, objections based on competence, relevance and admissibility, but not the ground of hearsay. Except as provided in this paragraph, this stipulation dispenses with the presentation of evidence in this action.

7. The following contentions are in dispute. FDIC will assert no defenses to any contentions recited in this stipulation except as stated in this paragraph.

(a) Plaintiffs contend that each plaintiff was an employee of BANK who was terminated on August 12, 1994, and who had a vested right as of that date to the payment of severance and separation pay pursuant to the policy of BANK applicable to all terminated employees. It is the position of the FDIC that such contention is irrelevant and should not be considered by this Court (because FDIC has already admitted liability for said breach of contract) and that proof of additional facts is unnecessary for the determination of the rights of the parties regarding method of payment of the judgment. For this reason and solely for the limited purpose of the determination of its motion, and denying the facts for all other purposes, the FDIC will neither challenge nor admit the truth of the matter asserted by

plaintiffs in this paragraph, and will contend that regardless of their merit or veracity such facts are irrelevant and immaterial to the issue of priority of payment to various creditors of the receivership. Plaintiffs deny that priority of payment is an issue an stated by FDIC.

(b) Plaintiffs further contend that under the authority of *Monrad v. FDIC*, *supra*, the severance and separation payments at issue here are pay or wages. FDIC contends that the severance and separation payments are benefits, not pay or wages.

(c) Plaintiffs further contend that they are entitled to pre-judgment interest on the damages awarded in the judgment; FDIC contends that they are not.

(d) Plaintiff DONALD J. BRUYN claims entitlement to $8,902.40 in vacation pay that was not paid to him at closure of the BANK, but that was included in his claim filed with FDIC and never denied. The parties will attempt to resolve this issue between themselves.

8. All discovery is complete.

9. There are no exhibits to be used except as provided in paragraph 6 of this stipulation.

10. There are no witnesses to be called.

11. There is no deposition testimony to be used.

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12. The following law and motion matters are to be had:

(a) Defendant FDIC will move this Court for an order that it is not liable to pay pre-judgment interest on plaintiffs' damages and that FDIC may satisfy the judgment to be entered herein by issuing Receiver's Certificates to plaintiffs.

(b) Plaintiffs will oppose the motion and seek the award of pre-judgment interest on the judgment and the payment of their damages in cash.

(c) FDIC will file and fax serve a motion that presents these two legal issues on or before September 2, 1997. Plaintiffs will file and fax serve their opposition to that motion on or before September 16, 1997. FDIC may file and fax serve a reply to plaintiffs' opposition on or before September 22, 1997. The motion will be heard on September 29, 1997, at 10:00 A.M., or as soon thereafter as the matter may be heard, in Courtroom 2 of the above-entitled court.

(d) If necessary, the parties will present the DONALD J. BRUYN claim for $8,902.40 in vacation pay to the Court for its decision, including the FDIC's argument that this matter is not properly before the Court, prior to entry of judgment herein.

13. Bifurcation is not necessary.

14. The foregoing admissions of fact and law having been made by the parties, and the parties having stipulated

that there are no issues of fact and law to be litigated other than as stated herein, this pretrial conference order shall supersede the pleadings and govern the course of all further proceedings in this cause unless modified to prevent manifest injustice, and plaintiffs are entitled to entry of judgment as provided and stipulated herein.

Dated: Sept 17, 1997

s/ GARY L. TAYLOR
GARY L. TAYLOR
UNITED STATES DISTRICT
JUDGE

Approved as to form and content
and stipulated between the parties.

TOLEDANO & WALD

By: s/ James Toledano
JAMES TOLEDANO
Attorneys for plaintiffs

COLLINS & BELLENGHI

By: s/ Julian Bellenghi
JULIAN BELLENGHI
Attorneys for defendant FDIC

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 27, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56747

DC No. CV 95-0017 GLT

SANDRA KAY BATTISTA; JOAN RENEE TAYLOR; DOUGLAS FABBRI; LAURIE LOU CHANDLER; SHERRY LEYSEN; KAREN A. MARINO; PATSY D. THOMPSON; BOBBIE J. MCNEIL; MARY MARSICANO; SHIRLEY A. VAN BUSKIRK; ERIKA RIVERO; ROBERT B. FATERNICK; DONALD J. BRUYN; ANNETTE HANSON; JULIE C. MAZO; CONSTANDEANNA ELENIE WRIGHT; GLENDA C. MOBERG; PAMELA A. FAIRCHILD; REBECCA L. SMITH; CATHY LYNN FULTON-MALONEY; HAROLD RICHARD NORBROTHEN; DEBORAH JANE TAFOYA; CARMEN RAZO; ROBERT EDWARD STEELE; DAVID S. GORDON; LINDA SUSAN AUBIN; GILBERT FONSECA; MARY KELLOGG; LISA M. KELSEY; LAURA LILLY; CAROLE MEYERS; JAMES W. PILGRIM; SARAH E. RODRIGUEZ; NANCY L. SHIPMAN; SHAWN ALISON SHOEMAKER; DONNA SMITH; JACKIE TODD; COURTNEY WIGHT; CHERYL C. ZWEBER; CAROL ANN OKON; LOIS A. MARCUS; JAMES L. LAURITZEN; VALERIE A. HUSSEY; ROBERTA L. FACCHINA; INA HAHN; DIANE JO ALLEN; TRACY A. ALLEN; CAROL DIGNARD; HASMIK KEYRIBARYAN; CATHY KIAHA;

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GEORGE KLASSER; EVODIO MEDINA; VIOLETTE NAAMAN; KIMBERLY JO OLIVA; HASMIK PASHAIE; SUSAN J. ROSSI; MARIA DEL CARMEN CONTRERAS; JOHN U. CRANDALL, III; JAN M. EISENBEISZ; KYLE LANCE MILLER,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Defendant-Appellee.

ORDER

Before: BOOCHEVER, O'SCANNLAIN, and TASHIMA, Circuit Judges

The panel has voted to deny appellants' petition for panel rehearing. Judges O'Scannlain and Tashima vote to deny the petition for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX F — RELEVANT STATUTE

12 U.S.C. § 1821

* * *

(d) Powers and duties of Corporation as conservator or receiver.

* * *

(3) Authority of receiver to determine claims.
(A) In general. The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) Notice requirements. The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall —

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required. The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books —

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

* * *

(5) Procedures for determination of claims. (A) Determination period. (i) In general. Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time. The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient. The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears —

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain —

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims. The receiver shall allow any claim received on or before the date

specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period. (i) In general. Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions. Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if —

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims. (i) In general. The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors. In the case of a claim of a creditor

against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution —

> (I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and
>
> (II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions. No provision of this paragraph shall apply with respect to —

> (I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or
>
> (II) any security interest in the assets of the institution securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (D). No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

* * *

(11) Depositor preference. (A) In general. Subject to section 5(e)(2)(C) [12 USCS § 1815(e)(2)(C)], of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or

any shareholder or creditor of such company).

* * *

(i) Valuation of claims in default. (1) In general. Notwithstanding any other provision of Federal law or the law of any State and regardless of the method which the Corporation determines to utilize with respect to an insured depository institution in default or in danger of default, including transactions authorized under subsection (n) of this section and section 13(c) [12 USCS § 1823(c)], of this title, this subsection shall govern the rights of the creditors (other than insured depositors) of such institution.

(2) Maximum liability. The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution without exercising the Corporation's authority under subsection (n) of this section or section 13.

* * * *